

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18011435
<b>DENNIS MCCOY AND KARIN MCCOY</b>	)	Date Issued: February 27, 2019
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**OPINION**

Representing the Parties:

For Appellant:	Dale E. Hanger, CPA
For Respondent:	Mira Patel, Tax Counsel Natasha Page, Tax Counsel

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Dennis McCoy and Karin McCoy (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$8,891.75<sup>1</sup> for the 2015 tax year.

Office of Tax Appeals Administrative Law Judges Daniel Cho, Linda Cheng, and Nguyen Dang, held an oral hearing for this matter in Van Nuys, California, on December 11, 2018. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUE**

Whether appellants have demonstrated reasonable cause to abate the late-filing penalty for the 2015 tax year.

**FACTUAL FINDINGS**

1. Appellants did not file a 2015 California income tax return by the due date of the return.

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<sup>1</sup> Although appellants’ claim for refund was for \$11,068, appellants’ representative clarified at the hearing that they were only disputing the late-filing penalty, which was \$8,891.75.

2. By check dated October 1, 2016, appellants made a payment of \$9,209 toward their 2015 tax liability.
3. On or about February 15, 2017, FTB received appellants' amended California income tax return for the 2015 tax year. However, FTB did not process the amended income tax return because FTB did not receive an original income tax return.
4. For the 2015 tax year, FTB received information from the Employment Development Department that appellant-husband received sufficient income to require him to file a 2015 California income tax return.
5. By Request for Tax Return dated April 25, 2017, FTB requested that appellant-husband file a 2015 California income tax return, provide evidence that he already filed his 2015 California income tax return, or explain why he did not have to file a 2015 California income tax return.
6. On May 9, 2017, appellant-husband contacted FTB in regards to the April 25, 2017 Request for Tax Return. During that conversation, FTB informed appellant-husband that it would use the previously filed amended California income tax return for the 2015 tax year, which reported a self-assessed tax of \$39,745 and a withholding credit of \$4,178 for a tax due of \$35,567.
7. On July 3, 2017, FTB issued a Notice of Tax Return Change – Revised Balance, which accepted appellants' reported California self-assessed tax of \$39,745 and the withholding credit of \$4,178. The Notice of Tax Return Change – Revised Balance also included a credit for appellants' previous payment of \$9,209. Lastly, the notice also informed appellants that FTB assessed and included a late-filing penalty of \$8,891.75 for the 2015 tax year.
8. On July 20, 2017, appellants paid the total owed to FTB as reflected on the Notice of Tax Return Change – Revised Balance, and on August 3, 2017, appellants filed a claim for refund with respect to the late-filing penalty.<sup>2</sup> The August 3, 2017 claim for refund asserted that appellants had reasonable cause for the late filing of their return. Specifically, appellants argued that they had a clean compliance history and that their tax

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<sup>2</sup> The claim for refund also requested relief of a "failure to pay" penalty; however, no such penalty was imposed on appellants for the tax year at issue. Furthermore, as previously stated, appellants' representative clarified at the hearing that they were only seeking relief of the late-filing penalty. Therefore, we will not address this argument any further.

preparer made a mistake when he failed to timely file their 2015 California income tax return. Appellants further stated that after the mistake was discovered, appellants promptly corrected the mistake and paid all taxes due in full.

9. FTB denied the claim for refund, and this timely appeal followed.
10. At the hearing, appellants further argued that prior to the 2015 tax filing deadline, appellants sought confirmation from their tax return preparer that appellants' 2015 California income tax return had been filed. According to appellants, the tax return preparer assured appellants that he had filed their 2015 California income tax return but was unable to provide appellants with any written confirmation from FTB. Appellants also stated that appellant-wife tried to confirm with FTB that their 2015 California income tax return had been filed, but appellants were unable to receive a response from FTB due to a two- to three-hour wait time for telephone communications. Accordingly, appellants believe that they acted reasonably and as a prudent person would in a similar situation.
11. At the hearing, FTB stated that its internal records did not log any phone calls from appellant-wife requesting confirmation of appellants' filing of their 2015 California income tax return. According to FTB, the first contact from appellants after the 2015 tax return filing deadline was on May 9, 2017, which was in response to the April 25, 2017 Request for Tax Return.

### DISCUSSION

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The penalty is computed at five percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a).) Here, the late-filing penalty appears to have been correctly calculated, and appellants have not disputed the computation of the penalty amount.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)<sup>3</sup> To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of

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<sup>3</sup> Precedential decisions of the Board of Equalization (BOE), designated by “SBE,” may be found on the BOE’s website: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 247.) Therefore, the failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not “reasonable cause” for a late filing. (*Id.* at p. 252.)

There is no dispute that appellants failed to timely file their 2015 California income tax return. In fact, appellants’ first attempt at providing FTB with a return was in February of 2017, which was 10 months after the due date of the return. Accordingly, FTB properly assessed the late-filing penalty.

Regarding reasonable cause, appellants have primarily argued that they relied on their tax return preparer to timely file their return. However, the United States Supreme Court stated in *Boyle, supra.*, that taxpayers have a personal, non-delegable obligation to file their tax return by the due date, and therefore, reliance on an agent is not reasonable cause. Thus, none of appellants’ arguments and explanations relating to reliance on their tax return preparer (e.g., seeking confirmation from their tax return preparer that their 2015 California income tax return was timely filed) constitutes reasonable cause.

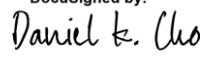
While appellants have also argued that they sought confirmation from FTB regarding the timely filing of their 2015 California income tax return, appellants’ representative clarified at the hearing that such a contact would have occurred after the due date of the return. Any action taken by appellants after the due date of the return would have no bearing on whether appellants acted with ordinary business care and prudence in attempting to timely file their return. Therefore, we find that this also does not constitute reasonable cause.

#### HOLDING


Appellants have failed to establish reasonable cause to abate the late-filing penalty (R&TC, § 19131) for the 2015 tax year.

DISPOSITION

FTB's denial of appellants' claim for refund is sustained.

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Daniel K. Cho  
Administrative Law Judge

We concur:

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Linda C. Cheng  
Administrative Law Judge

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Nguyen Dang  
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